78-239

AUG 4 1973

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

LOUIS SMITH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Petitioner prays that a Writ of Certiorari issue to review the ruling of the Supreme Court of Ohio entered in the above entitled case on May 18, 1973 dismissing the appeal of petitioner from the judgment of the Common Pleas Court of Hamilton County, Ohio sentencing petitioner to one to three years in the Ohio State Penitentiary.

OPINION BELOW

The judgment of the Court of Common Pleas, Hamilton County, Ohio is unreported and printed herein as Appendix A. The entry and decision of the Court of Appeals, First Appellate District, Hamilton County, Ohio is unreported and printed herein as Appendices B and C.

The entry of the Supreme Court of Ohio dismissing the Appeal is unreported and printed herein as Appendix D.

JURISDICTION

The judgment of the Court of Common Pleas was dated and entered on April 21, 1972. The judgment was affirmed by the Court of Appeals, First Appellate District, Hamilton County, Ohio on February 5, 1973. The Supreme Court of Ohio dismissed the appeal for the reason that no substantial constitutional question existed on May 18, 1973. Jurisdiction of this Court is invoked under 28 U.S.C.A. section 1257 (3) and 2101, and Part V of the Rules of this Court.

QUESTION PRESENTED

The Constitutional question presented by this Writ of Certiorari was raised at the earliest possible instance in the entire cause; was presented to the Court of Common Pleas in a separately heard Motion to Suppress and thereafter renewed during the merit trial; was argued on appeal to the First Appellate District of Ohio; was presented in a Memorandum in Support of Jurisdiction to the Supreme Court of Ohio and is presented as follows:

(1) Whether the petitioner's constitutional protection against unreasonable search and seizure, under the Fourth and Fourteenth Amendment of the United States Constitution, was violated when a police officer entered a four family dwelling unit and thereafter entered petitioner's apartment, without a search warrant and without permission or consent for such entry and subsequent search, and without arrest of petitioner, commenced to search petitioner and seized a revolver from the person of the defendant.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV, Constitution of the United States

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section I, Amendment XIV, Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

STATEMENT OF THE CASE

On February 21, 1971, at approximately 5:00 p.m., police responded solely to a radio dispatch in full as follows: "man with a gun 670 North Crescent" (States Exhibit 6). No evidence was ever offered as to the antecedents or basis of such radio call. A cruiser went to a street adjacent to North Crescent and stopped by a single residential building with single front and single back door, on the corner of North Crescent and said adjacent

street. They dismounted, went to the rear door and on the basis of hearing voices inside said building, entered the rear of the same without knocking or otherwise announcing their presence. Both officers had no prior knowledge of the content, number of dwellings, or any details of the interior of said building save that it was a residence in a Negro neighborhood. (R. 246). Having gained admittance they noted it was apparently a four apartment dwelling and proceeded to the second floor. On the landing of the second floor leading into the defendant's apartment the officers encountered petitioner Smith and his wife at the door of their apartment. In a polite conversation, both petitioner Smith and his wife, the only civilians present, indicated they had no knowledge of a complaint nor of anyone calling the police. One officer testified that at the conclusion of the conversation as the petitioner made a slight turn as if to turn back into his apartment the officer noticed an indefinable bulge in his coat. (R. 20, 236, 237). The position of the alleged and admittedly indefinable bulge changed location from under the left armpit in the preliminary examination, and earlier trial on assault on a police officer[1] to the side and kidney area in the trial (R. 14 ,15, 275). The second officer testified at no time did he see a bulge. (R. 336). The first officer then, without speaking, "grabbed for him" (petitioner Smith) in order to search him and what happened next is in conflict. Petitioner Smith, supported by his wife, says the officer pushed into his apartment, grabbed the petitioner, handcuffed him, searched him in several pockets and finally withdrew a gun from the back fowl pocket of the petitioner's hunting jacket. (p. 490-492). The officer, not fully supported by his fellow officer, said petitioner Smith coun-

[1] The petitioner was subsequently acquitted of the charge of assault on a policeman in the Municipal Court of Hamilton County, Ohio.

ter pushed him back down two steps, and after an altercation the officer finally subdued the petitioner, handcuffed him, conducted a search of his entire person and then recovered a hand pistol from the back fowl pocket of the petitioner's hunting jacket. The record indicates that the officer neither ordered nor requested the petitioner to submit to a search nor did he place petitioner under arrest before searching him. The hunting jacket was introduced into evidence. (Defense Exhibit A). The back fowl pocket is a commodius patch at bottom middle rear of the upper thigh length jacket, designed for the holding of slaughtered small game.

The case was tried to a jury after a motion to suppress evidence was overruled.

REASON FOR GRANTING THE WRIT

This case presents a significant issue of constitutional law for this Court's review: entry, unannounced and uninvited, by police officers into a private dwelling on the basis of a radio call prompting investigation of an area and without arrest or search warrant, entry is made into a home and with only the presence of a possible bulge in a person's clothing, and without consent, that person is searched and a revolver is seized from which an arrest for carrying a concealed weapon is then made, is a question of constitutional magnitude for this Court's determination to govern future conduct of police officers under similar conditions.

I.

WHETHER THE PETITIONER'S CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE, UNDER THE FOURTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, WAS VIOLATED WHEN A POLICE OFFICER ENTERED A FOUR FAMILY DWELLING UNIT, AND THEREAFTER ENTERED PETITIONER'S APARTMENT, WITHOUT A SEARCH WARRANT AND WITHOUT PERMISSION OR CONSENT FOR SUCH ENTRY AND SUBSEQUENT SEARCH, AND WITHOUT ARREST OF PETITIONER, COMMENCES TO SEARCH PETITIONER AND SEIZES A REVOLVER ON THE PERSON OF THE DEFENDANT.

Probable cause is required to justify a warrantless search and seizure of an individual and petitioner contends the facts herein show substantially less than probable cause. In *Terry* v. *State of Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d. 889 (1968) this Court said that the requirement of probable cause remains "fully relevant" to police conduct in the context where swift action is predicated by on-the-spot observations. In order to justify his intrusion into the constitutionally protected rights of the petitioner the police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonable warrant that intrusion" *Terry* at p. 20, 21. Two policemen came to the house of the petitioner after a radio dispatch ("man with a gun")[1]

[1] Carrying a gun is in and of itself not a crime in Ohio. The sole restraints are O.R.C. 2931.01 forbidding possession of a concealed wea-

and after hearing voices in conversation, described by one officer as loud (R. 236) and by the other as normal conversation (R. 327, 331) entered a residence without knocking. Although it turned out after entry to be a four family, it was to them merely a residence. (R. 246). From this point on the "search" was constitutionally tainted. Other events further destructive of Fourth Amendment rights were to occur.

The officers then proceeded to the second floor where they encountered and had a polite conversation with the petitioner and his wife who both indicated they had no knowledge of any call to the police or any reason for a call to the police. There was no excitement or agitation, nor evidence of a crime, nor indication of probable cause whatsoever. Then as the petitioner was turning back into his own apartment at the conclusion of a non-rude, logical conversation, only one officer said he saw an indefinable bulge in the petitioner's clothing whereupon he physically grabbed the petitioner. He made no request or order concerning search or any form of oral inquiry or order whatsoever. He merely grabbed at the petitioner. Under *Beck* v. *Ohio*, 379 U.S. 89, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) there were no facts available to the police that would warrant a man of reasonable caution to believe, that an offense had been committed. Indeed, after a reasonable and responsive conversation between petitioner Smith, his wife and the officers, the petitioner rather than constituting a threat, according to the officer's testimony, was stepping from the second floor entryway back into the interior of his own apartment. (R. pp. 236, 237). In dealing with probable cause, consideration is given to "factual and practical considerations of everyday

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pon, O.R.C. 2923.04 forbidding possession of a machine gun without a permit, and O.R.C. 2923.011 forbidding possession of a weapon on an aircraft.

life on which reasonable and prudent men, not legal technicians act." *Brineger* v. *United States,* 338 U.S. 160, 69 S. Ct. 1302, 1310 93 L. Ed. 1879 (1949). The vague, non-criminal radio call and the questionable "bulge" in a hunting jacket are the only factual, practical considerations upon which the officer could act. These facts do not qualify as probabilities which a reasonable prudent man may use to determine probable cause, nor a threat which precluded ordinary courtesy, much less the overriding of constitutional rights.

Probable cause necessary to justify governmental intrusion into the petitioners privacy cannot be retroactively supplied by the evidence uncovered. *Rios* v. *United States,* 364 U.S. 253, 4 L. Ed. 2d 1688, 80 S. Ct. 1431 (1960). Where, as herein, no probable cause exists for an arrest, "it is axiomatic that an incident search may not precede an arrest and serve as part of its justification. *Sibron* v. *State of New York,* 392 U.S. 40, 63, 88 S. Ct. 1889 20 L. Ed. 889 (1968).

Respondent has argued below that the officer could act to protect himself. "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything he must have constitutionally adequate, reasonable grounds for doing so. In the case of a self protective search for weapons he must be able to *point to particular facts from which he reasonably inferred that the individual was armed and dangerous.* (Emphasis added). *Sibron* v. *State of New York, supra,* p. 64 citing *Terry* v. *Ohio, supra.* Neither officer, testified to any facts which indicate they suspected the petitioner to be armed and dangerous, nor anything in his conduct or demeanor which could even cause fear. Rather than acting in a manner to place the officers

in fear of physical danger petitioner in his own home had been a polite and responsive citizen and at the end of a conversation was merely turning to go back into the main portion of his home when the officer grabbed him.

It is submitted, therefore, that the search being without probable cause, and evidence obtained as a result thereof must be excluded as evidence against the petitioner.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION

No. 98262

THE STATE OF OHIO
vs.
LOUIS SMITH

INDICTMENT FOR: CARRYING CONCEALED WEAPONS

(Entered April 21, 1972)

The Defendant herein having been convicted of Carrying Concealed Weapons was this day brought before this Court, and being represented by Allen Brown, his Counsel, who was present, and the Defendant being informed of the Verdict of the Jury, was inquired of if he had anything to say why Judgment should not be pronounced against him, and having nothing further to say than he hath already said,

IT IS THEREFORE ORDERED AND ADJUDGED, by this Court, that the Defendant be imprisoned and confined in the Ohio State Penitentiary, at Columbus, Ohio, and kept at hard labor, but without any solitary confine-

ment for a period of not less than one (1) Year, not more than three (3) Years, and that he pay the Costs of this Prosecution for which Execution is awarded.

/s/ MORRISSEY, Judge

APPENDIX B

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-72156

STATE OF OHIO,
Plaintiff-Appellee,

vs.

LOUIS SMITH,
Defendant-Appellant.

DECISION

(Filed February 5, 1973)

Messrs. Simon L. Leis, Jr., and William S. Payler for Plaintiff-Appellee, Mr. Allen Brown for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard on questions of law, transcript of the docket and journal entries and original

papers from the Court of Common Pleas, Hamilton County, transcript of the proceedings, assignments of error, briefs and arguments of counsel.

Appellant presents four assignments of error. Assignment one states that the trial court erred in refusing to suppress evidence obtained by a warrantless search of the defendant's person. An examination of the record discloses that the police had probable cause to arrest the defendant and that the search conducted was incident to that lawful arrest. See *Chimel* v. *California*, 395 U.S. 752; *Beck* v. *Ohio*, 379 U.S. 89; also *Terry* v. *Ohio*, 392 U.S. 1. Assignment one is without merit.

In assignment two it is claimed that the trial court erred in not allowing the defendant to introduce a transcript of a preliminary hearing and proof of his previous acquittal on a misdemeanor charge of assault and battery on a police officer for the purposes of impeachment. The record reveals that the appellant questioned the police officers at length as to certain claimed discrepancies between their testimony at trial and that given during a preliminary hearing. The entire record of the proceeding in a preliminary hearing is not admsisible in evidence at the trial of the offense following indictment. Therefore, assignment two is not well taken.

The claim is made in assignment three that the trial court erred in not allowing evidence of threats which would constitute circumstances justifying a prudent man in carrying a concealed weapon for the defense of his person. An examination of the record fails to support appellant's claim. The trial court properly excluded evidence of which the witnesses could not testify from their own knowledge. Assignment three is not well taken.

Assignment four states that the trial court verdict was erroneous because the greater weight of the evidence was that the defendant was at the time of carrying the weapon

engaged in a lawful calling and under such circumstance that would justify a prudent man in carrying such a weapon for the defense of his person. An examination of the record discloses ample probative evidence of each element of the crime charged. The jury verdict is supported by the record. Assignment four is not well taken.

It is, therefore, ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County be, and the same hereby is, affirmed.

HESS, P. J., YOUNG and SHANNON, JJ.

APPENDIX C

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-72156

Common Pleas Court
No. 98262

STATE OF OHIO,

Appellee,

vs.

LOUIS SMITH,

Appellant.

JUDGMENT ENTRY

(Entered February 5, 1973)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Common Pleas Court of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Common Pleas Court of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO
1973 TERM
To wit: May 18, 1973

No. 73-257

THE STATE OF OHIO,
City of Columbus.

STATE OF OHIO, Appellee,
vs.
LOUIS SMITH, Appellant.

APPEAL FROM THE COURT OF APPEALS
for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this .... day of ..... 19..
..... Clerk
..... Deputy